NO. 57716-0-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

PAUL BRAIN,

Appellant

v.

CANTERWOOD HOMEOWNERS ASSOCIATION

Respondent

RESPONDENT CANTERWOOD HOMEOWNERS ASSOCIATION'S BRIEF

GORDON REES SCULLY
MANSUKHANI, LLP
Kyle J. Rekofke, WSBA # 49327
701 Fifth Avenue, Suite 2100
Seattle, WA 98104-7084
Attorney for Canterwood Homeowners Association

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I. INTRODUCTION

The Appellant is Paul Brain ("Mr. Brain"), who along with his wife own a single family residence located in Canterwood. Canterwood is a gated residential community located in Gig Harbor, Washington consisting of approximately 750 homes.

The Respondent is the Canterwood Homeowners Association ("Canterwood" or "the Canterwood HOA"), a non-profit corporation that was formed "under Chapter 24.03 of the Revised Code of Washington" in 1981. Canterwood was incorporated to provide a means for meeting the purposes of the CC&Rs. CP 111-142; 144-51. Canterwood is governed by a Board of Directors, who are elected by the members at its annual meeting. CP 111-142; 144-151;153-160.[1].

For each annual meeting, the Canterwood HOA mails one notice of meeting and one ballot to each lot, regardless of the number of lot owners. Mr. Brain's Complaint for Declaratory Relief (the "Complaint") alleges for the 2020 and 2021 HOA elections, the Canterwood HOA delivered the notice of meeting and the ballot to his wife, but not a separate notice of meeting and ballot to him, depriving him of notice and of his right to vote in violation of Canterwood's governing documents and the law.

Mr. Brain moved for summary judgment, and since there were no genuine issues of material fact, the trial court correctly granted summary judgment in favor of Canterwood and dismissed Mr. Brain's Complaint.

[1] The Canterwood CC&Rs, Articles of Incorporation and Bylaws are sometimes collectively referred to as the "Canterwood Governing Documents".

Mr. Brain now appeals that order on summary judgment.

II. ASSIGNMENTS OF ERROR

Canterwood assigns no error to the trial court's decision granting summary judgment in its favor.

III. STATEMENT OF CASE

Canterwood is a high-end residential community located in Gig Harbor, Washington with approximately 750 lots. CP 197-799. The Canterwood community is regulated pursuant to its Amended and Restated Declaration of Covenants, Conditions and Restrictions, dated January 1988, and recorded under Pierce County Auditor's No. 8803180143 (the "CC&Rs"). CP 111-142. All owners and occupants of lots in the Canterwood community are subject to and must comply with the Canterwood CC&R's. *Id*. Pursuant to the Canterwood HOA Articles of Incorporation Article X, and the CC&Rs Section 1.16, every owner of a lot is a member of Canterwood HOA. CP 147; 114.

A. The Members Provide Their Information To Canterwood.

Canterwood obtains information regarding the ownership of each lot from the owners and/or from the escrow agent following closing. CP 186. Sometimes, an owner will update that information by sending an e-mail or calling Canterwood. *Id*. Canterwood does not investigate the ownership information to determine if it is accurate or complete. *Id*. Canterwood maintains that information in a spreadsheet that is routinely updated. *Id*. If an owner identifies more than one person as having an ownership interest in a lot, Canterwood addresses the envelope to all of those persons, similar

to how the Pierce County Assessor Treasurer references taxpayers of a lot. *Id*.

Whenever Canterwood wants to issue physical mailings to the members, it uses this spreadsheet to generate mailing labels. CP 186. Whatever name(s) and the address that is provided to Canterwood is included on the mailing label. *Id*. For instance, when Canterwood has been provided the names of a husband and wife as lot owners, the label would look like the following:

> John & Jane Smith
> 1234 Canterwood Dr. NW
> Gig Harbor, WA 98332
>
> or if the owners have different last names:
>
> John Smith & Jane Jones
> 1234 Canterwood Dr. NW
> Gig Harbor, WA 98332
>
> *Id*.

B. The Notice and Voting Procedures in the Canterwood Governing Documents.

The Canterwood HOA Bylaws specify the process for providing notice of the annual meetings and states in pertinent part as follows:

> Section 1. Annual Meetings. The annual meeting of the members shall be held in December of each year. Written notice of the annual meeting shall be given by mailing a copy of such notice, postage prepaid, not less than fifteen (15) nor more than fifty (50) days before the date of the meeting, to each member entitled to vote thereat, addressed to the member's address last appearing on the books of the Association, or supplied by such member to the Association

> for the purpose of notice. The notice shall state the place, day, and hour of the annual meeting. (Emphasis added).
>
> CP 153.

The Canterwood CC&Rs specify the process for voting and state in pertinent part as follows:

> Section 4.2. Classes. The Association shall have two (2) classes of voting membership:
>
> (a) Class "A". Class "A" members shall be all owners . . . and shall be entitled to one (1) vote for each dwelling unit owned. When more than one person holds an interest in any dwelling unit, all such persons shall be members. The vote for such dwelling unit shall be divisible and exercised as the owners determine, but in no event shall more than one vote be cast with respect to any dwelling unit. (Emphasis added).
>
> CP 120.

The Canterwood Articles of Incorporation are almost identical to the CC&Rs with respect to voting[2] and provide in pertinent part as follows:

> Section 1. Classes. The Association shall have two (2) classes of voting membership:
>
> (a) Class "A". Class "A" members shall be all owners . . . and shall be entitled to one (1) vote for each lot owned. When more than one person holds an interest in any lot, all such persons shall be members. The vote for such lot shall be divisible and exercised as they determine, but in no event shall more than one vote be cast with respect to any lot. (emphasis added).
>
> CP 147.

[2] The CC&Rs use the term "dwelling unit" and the Articles of Incorporation use the term "lot". The CC&Rs state that "[t]he term "dwelling unit" shall encompass the lot upon which a dwelling unit is located and shall also apply to any undeveloped lot." To avoid confusion, the term "lot" is used in the discussion below.

C. The Ballot.

The ballot Canterwood provides is not numbered nor does it have any unique markings that would identify it as an authentic or legitimate ballot or that would otherwise distinguish it from any other ballot. CP 55; CP 68; CP 187. In fact, the ballot could be photocopied and the copy would appear identical to the original. However, for the ballot to be counted, it must be in the sealed "secret envelope" provided by Canterwood and sent back in the supplied return envelope which is stated on the ballot. CP 187 The return envelope had windows, one for Canterwood and another for the sender's return address. *Id*. Prior to the 2021 annual meeting, the envelope also contained a signature line for the owner to sign. *Id*. When the secret envelope is returned to Canterwood, Canterwood determines if the signer or the name on the letter is a lot owner and, if so, once that person votes, no other ballots for that lot will be included in the votes to be counted. *Id*.

D. Notice of the Annual Meetings.

For the 2020 annual meeting, Canterwood generated labels from its spreadsheet and affixed the labels to the envelopes, stuffed the envelopes with the annual meeting information, a ballot, a proxy and other relevant information and mailed the envelope via first class mail to the address it was provided. *Id*. For the 2021 annual meeting, Canterwood used a mailing house, OSG / SouthData, who followed the same process as Canterwood had the previous year. *Id*. In each instance, only one notice and one ballot is mailed per lot, regardless of the number of owners. *Id*.

In 2020 and 2021, Canterwood HOA addressed the envelope to Mr. Brain and his wife as follows:

> PAUL & VANESSA BRAIN/HERZOG
> 4723 OLD STUMP DR NW
> GIG HARBOR, WA 98332
>
> CP 187.

Mr. Brain admits both the 2020 and 2021 annual meeting notices and ballots were delivered to his Canterwood home acknowledging that his wife "received a notice and ballot [for the 2020 and 2021 annual meetings] but, in neither election was [he] provided a notice or a ballot." CP 45-46. Mr. Brain further states that he did not see either the 2020 annual meeting notice or the 2020 ballot during the course of the 2020 elections. CP 46.

Despite stating he did not see either the notice or ballot, he included a copy of the 2020 ballot in which he is listed as a candidate for the Canterwood Board of Directors. CP 55. Mr. Brain was subsequently elected to the Canterwood Board and after eight months resigned and sued Canterwood in an earlier lawsuit under Pierce County Cause No. 21-2-07619-1. CP 162-73. The court subsequently dismissed Mr. Brain's first lawsuit on Canterwood's Motion to Dismiss. CP 175-78.

In his first lawsuit, Mr. Brain advised Canterwood of his expertise in HOA matters as follows:

> I have been in practice since 1983. The majority of my practice involves representation of the residential subdivision and homebuilding industries. My clients include the world's largest home builder - Lennar, and the largest regional builder - Soundbuilt Homes. I have been involved in numerous engagements involving

> CCR. This includes advising clients regarding the scope and effect of CCR as well as litigating issues arising from CCR. In the last three years this has involved 5 cases involving the effect and/or enforceability of CCR.
>
> CP 180-82.

Despite Mr. Brain's stated expertise, at no time after he was elected to the Canterwood Board did he ever express any concern regarding notice of the 2020 annual meeting or the 2020 election process. CP 198. In fact, Mr. Brain assumed the role of director without any hesitation. CP 198.

Mr. Brain also states that he did not see either the 2021 annual meeting notice or the 2021 ballot during the course of the 2021 elections. CP 46. However, prior to the December 7, 2021 annual meeting, Mr. Brain and his wife exchanged several e-mails with Canterwood's property manager regarding the annual meeting and ballot. CP 57-60. In one e-mail, Mr. Brain stated as follows:

> The CCR are very clear that every owner has a right to vote and that if there is more than one owner, the one vote granted to each dwelling unit is divisible based on the number of owners. I think that in deciding not [sic] accept or count divisible votes, the HOA has essentially amended the CCR provision without a 75% vote of the members. This is what happens when a bunch of arrogant amateurs decide they know better. The management company doesn't even have that excuse.
>
> CP 184.

Even though Mr. Brain recognized that the annual meeting notice and the ballot had been mailed to both he and his wife, he never complained that he did not receive notice of the 2021 annual meeting. CP 57-60.

Rather, he only complained that he and his wife should each receive their own ballot. *Id*.

In December 2020 and December 2021, Canterwood held its annual meetings. CP 53; 66. Because of the COVID mandates issued by the Governor, both meetings were held virtually[3]. CP 53; 66. For both meetings, members were allowed to cast their ballots prior to the meeting, on the day of the meeting and for a few days after the meeting. CP 53; 66. With the exception of Mr. Brain and his wife, no other member complained about either the 2020 or 2021 notices or ballots.

E. Mr. Brain's Complaint and its Subsequent Dismissal by the Trial Court.

On June 10, 2022, Mr. Brain filed his Complaint seeking a declaratory judgment that Canterwood's 2020 and 2021 elections of the Board of Directors are invalid because he and his wife only received one ballot and not two, which Mr. Brain contends is not in compliance with Canterwood's Governing Documents or the law. CP 329.

On August 30, 2022, Mr. Brain moved for summary judgment. CP 7-44. Canterwood opposed the motion, argued there were no genuine issues of material fact and that Canterwood was entitled to a judgment dismissing Mr. Brain's Complaint as a matter of law. CP 89-107.

The Trial Court determined that Canterwood provided proper notice of the annual meetings to Mr. Brain and a single ballot complied with the requirements stating as follows:

[3] The Governor's mandate provided that homeowner associations could meet virtually.

> I think the fact that a ballot for a vote was provided to the owners of the lot, there is nothing that would preclude Mr. Brain and his wife from indicating on the ballot, half vote for Candidate A; half vote for Candidate B. I think it minimally meets the requirements. I don't think it's the best practice in the world, but I think it minimally meets the requirements of allowing for a fractional vote.
>
> I additionally think it is important that there is no showing here that even if there was an error, it would have changed the result of the election.
>
> . . .
>
> I also think it's significant that in all of these years, there has really only been one complaint raised about it. That would at least suggest to the Court that nobody else feels like they weren't heard or at least they haven't voiced that they haven't been heard, which, again, I think, in this Court's estimation, establishes that there is no evidence that it would have changed the result.
>
> Transcript at 29-30.

The Trial Court then denied Mr. Brain's summary judgment motion and entered an order granting summary judgment to Canterwood. CP 208-10. Mr. Brain subsequently moved for reconsideration, to which Canterwood responded. CP 200-07. The trial court concluded its original decision was correct and denied Mr. Brain's motion for reconsideration. CP 313-14. This appeal followed.

IV. AUTHORITY AND ARGUMENT

A. Standard of Review.

The standard of review on the trial court's decision to grant Canterwood summary judgment is de novo. *Briggs v. Nova Services,* 166 Wn.2d 794, 801, 213 P.3d 910 (2009). This court "may affirm on any ground supported by the record." *Washington Fed. Sav. & Loan Ass'n v.*

Alsager, 165 Wn. App. 10, 14, 266 P.3d 905 (2011).

B. Canterwood is not required to issue a separate notice of the annual meeting to every owner.

Mr. Brain argues Canterwood must provide a separate notice to each lot owner, not one notice to each lot. Appellant's Brief at 6. This Court should reject any attempt by Mr. Brain to create the fiction that unless the envelope is addressed to him (and him alone) he can claim he did not receive it.

First, notices are required to be sent to a lot owner at the lot address unless the owner specifies otherwise. RCW 64.38.110(2)(b) states "Notice to a lot owner or occupant shall be addressed to the lot address unless the owner has requested, in a writing delivered to the association, that notices be sent to an alternate address." Canterwood has been mailing all of the notices to Mr. Brain at his lot address and at no time has Mr. Brain requested the notices be sent to some other address. Furthermore, there is no dispute that the notices were addressed to both Mr. Brain and his wife and Mr. Brain has admitted that the notices were received.

Second, it is disingenuous for Mr. Brain to say "I did not see either [the annual meeting notice or the ballot] in the course of the 2020 election" when he was on the ballot for a director position and he subsequently assumed that position without any objection or protest. CP 45-46; 55. Similarly, in 2021, Mr. Brain cannot now say "I did not see either [the annual meeting notice or the ballot] in the course of the 2021 election" after he exchanged multiple e-mails with Canterwood immediately before the

2021 annual meeting arguing over his interpretation of the Governing Documents allowing fractional voting and complaining Canterwood is "a bunch of arrogant amateurs". CP 46. Even if the notice was somehow defective, Mr. Brain clearly waived any such claim pursuant to RCW 24.03.460.

Lastly, even if Canterwood's notice to Mr. Brain was somehow defective, which it was not, that will not invalidate the results of the elections. RCW 64.38.110(5) states "[t]he ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting." (Emphasis added). Canterwood made a good faith effort to provide notice to Mr. Brain by addressing the envelope to he and his wife at his mailing address (which is authorized under the statute) and he admits the notices were received by them.

Mr. Brain argues the provisions in the Nonprofit Miscellaneous and Mutual Corporations Act, Ch. 24.06 RCW, require Canterwood to issue a notice to every owner of a lot. Appellant's Brief at 6-7. First, chapter 24.06 RCW does not apply to Canterwood because Canterwood was expressly incorporated under the Washington Nonprofit Corporation Act, Ch. 24.03 RCW (now Ch. 24.03A RCW which took effect January 1, 2022 and after both the 2020 and 2021 annual meetings) and pursuant to former RCW 24.03.010(1) that act applies. CP 144. Second, although some of the statutory provisions in chapter 24.03 RCW are similar to some of the provisions in 24.06 RCW, none require Canterwood to provide a separate notice to every lot owner.

As stated in both the Canterwood CC&Rs and in its Articles of Incorporation, "The vote for [each lot] shall be divisible and exercised as the owners determine, but in no event shall more than one vote be cast with respect to any [lot]." (Emphasis added). CP 120; 147. As discussed below, each lot has only one vote and thus only one notice, regardless of the number of owners.[4]

Mr. Brain argues RCW 24.06.105 supports his position. Appellant's Brief at 7. Even though that statute does not apply to Canterwood, it expressly states "notice . . . shall be delivered . . . to each member or shareholder entitled to vote at such meeting." RCW 24.06.105 (Emphasis added). This is consistent with Canterwood's Articles of Incorporation and CC&Rs limiting the members voting where it states "in no event shall more than one vote be cast with respect to any [lot]".[5] CP 120; 147. The Non-Profit Corporation Act is consistent with Canterwood's Governing Documents only requiring notice be given to the members entitled to vote at the meeting.[6] All of these are consistent with the conclusion that when there is only one vote, there is only one notice. As discussed below, each

[4] If more than one notice must be issued to a lot, but only one ballot is required, it necessarily means only one owner would receive a ballot and the others would not. This would be an absurd result.

[5] Mr. Brain contends that Canterwood did not comply with its Governing Documents because its notice of the meeting did not advise owners that they could vote fractionally. Appellant's Brief at 8, 11. Mr. Brain has provided no authority for this argument. Moreover, the Canterwood CC&Rs and Articles of Incorporation are almost identical stating "[t]he vote for such lot shall be divisible and exercised as they determine, but in no event shall more than one vote be cast with respect to any lot." (Emphasis added). CP 120; 147.

[6] RCW 24.03A.410(1) states in pertinent part "Except as provided in this chapter, the articles, or the bylaws, the corporation is only required to give notice to members entitled to vote at the meeting." (Emphasis added).

lot has only one vote and thus only one notice, regardless of the number of owners.

The Act further provides that "The attendance of a member at a meeting . . . [w]aives objection to lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting or immediately upon arrival at the meeting objects to holding the meeting or transacting business at the meeting. RCW 24.03A.415(2)(a). Mr. Brain never objected to the notices.

There is no support for Mr. Brain's argument that separate notice must be provided to each member living at the property and the trial court's decision should be affirmed.

C. Canterwood is not required to issue a separate ballot to every owner.

The Canterwood CC&Rs and Articles of Incorporation are almost identical with regard to voting stating each lot has one vote and "[t]he vote for such lot shall be divisible and exercised as they determine, but in no event shall more than one vote be cast with respect to any lot." (Emphasis added). CP 120; 147.

Canterwood has always interpreted these provisions to allow only one vote to be cast per lot, not multiple ballots consisting of fractional votes. Therefore, Canterwood only issues one ballot per lot even if there is more than one owner because only one vote can be cast. Canterwood's interpretation recognizes that where a lot is owned by more than one person, a majority of the owners of the lot decide how that one vote is cast (the vote

shall be exercised "as the owners determine, but in no event shall more than one vote be cast"). That is, one ballot is cast, not a series of votes (plural) or series of ballots (plural) totaling one.

"[H]omeowners associations must be given room to interpret and apply their own governing documents as long as the result is neither arbitrary nor unreasonable." *Parker Estates Homeowners Association v. Pattison*, 198 Wn. App. 16, 31, 391 P.3d 481 (2016). Canterwood's interpretation of their Governing Documents, that each lot will receive only one ballot regardless of the number of owners, is neither arbitrary nor unreasonable. Canterwood's interpretation is not only consistent with the plain language in the Governing Documents noted above, but also with Canterwood's longstanding past practice for the last 40 years during which time there have been no objections. Moreover, Canterwood's interpretation is consistent with the Washington Homeowner Association Act, chapter 64.38 RCW, which reaches the same conclusion.

RCW 64.38.120(3)(b) states in pertinent part "If more than one of the lot owners are present [at a meeting], the votes allocated to that lot may be cast only in accordance with the agreement of a majority in interest of the lot owners, unless the declaration expressly provides otherwise." The reference to the single vote being cast in accordance with a "majority" of the lot owners is identical to Canterwood's interpretation that there is only one ballot and only one vote, determined by the majority, not a series of ballots or votes reflecting fractions of one vote. Moreover, and perhaps most compellingly, the statute further provides that "[t]here is a majority

agreement if any one of the lot owners casts the votes allocated to the lot without protest being made promptly to the person presiding over the meeting by any of the other lot owners of the lot." See RCW 64.38.120(3)(b). This statutory language validates Canterwood's interpretation that there is only one vote and thus only one ballot because it expressly provides a remedy to a lot owner that disagrees with how a co-owner cast that one vote. In this instance, Mr. Brain certainly could have, but did not, protest the way in which his wife voted. Additionally, if Mr. Brain does disagree with how his wife voted, his remedy is with his wife, not with Canterwood.

Finally, nothing in the Canterwood Governing Documents specifically allows fractional votes to be cast or requires Canterwood to advise members that they can vote fractionally, instead saying "one" vote may be cast.[7] The reason all lot owners are "members" is to allow all of the lot owners the rights (and subject them to all of the obligations) specified in the CC&Rs. The vote is only "divisible" to the extent it recognizes multiple owners are "members" and allows all of the owners of a lot to each have an opinion, but ultimately whatever the majority of owners of the lot decides, that is how the <u>one</u> vote will be cast. It also recognizes that if there are two lot owners and those two lot owners disagree, that is if they were to each vote one-half (one votes "yes" and the other votes "no"), they would simply

[7] While Mr. Brain points to a statement made by Canterwood's property manager about fractional voting, whether that statement by a third-party is binding on Canterwood requires a legal analysis not offered by Mr. Brain at the trial court level or on appeal. Regardless, nothing in the Canterwood Governing Documents specifically allows fractional votes to be cast, instead saying "one" vote may be cast.

cancel each other out. That would be the same result as no vote being cast by the lot.

Mr. Brain's argument that a ballot must be delivered to every lot owner centers on the definition of the term "ballot". He first relies on RCW 29A.04.008 (the statute governing the election of state and local political candidates) and then RCW 64.38.120(6). To properly analyze the two statutes, the Court must begin with RCW 64.38.120(6), which is part of the Homeowner Association Act, because that statute renders RCW 29A.04.008 inapplicable for the reasons discussed below.

1. RCW 64.38.120(6)(c) does not apply to these facts.

Mr. Brain relies on the language in RCW 64.38.120(6)(c) that states "The association must deliver a ballot to every owner with the notice" for his argument that where a lot has more than one owner, Canterwood must deliver a separate ballot to each of those owners. First, RCW 64.38.120 did not become effective until July 25, 2021, thus the statute clearly cannot support Mr. Brain's argument to invalidate the 2020 election. *See* WA LEGIS 227 (2021), 2021 Wash. Legis. Serv. Ch. 227 (S.S.B. 5011). Second, the subsection Mr. Brain relies on does not apply because Canterwood conducted a meeting in both 2020 and 2021.

RCW 64.38.120(6) only applies when a vote is conducted without a meeting. *See* RCW 64.38.120(2) ("When a vote is conducted without a meeting, owners may vote by ballot pursuant to subsection (6) of this

section."). Mr. Brain states Canterwood conducted a vote without a meeting because "in both 2020 and 2021, the vote was not conducted at the general meeting."[8] CP 10. To be more precise, Mr. Brain is saying even though a meeting was held, the statute applies because the act of voting did not occur in the meeting. Mr. Brain made a similar statement at oral argument on the summary judgment motion as follows:

> [RCW 64.38.120] is explicit. It requires each member to be delivered a ballot if the vote is not going to be taken at a meeting.
> . . .
> The statutory scheme is really simple. <u>It says if you are not voting at a meeting where somebody can protest an entire vote be cast differently than its fractional ownership, then you have to give everybody a ballot so they could vote their interest outside the meeting</u>.
>
> VRP 18-19. (Emphasis added).

Mr. Brain's statements of the facts and the law are inaccurate. Mr. Brain characterizes the language in the statute to require <u>the act of voting be conducted at the meeting</u>. Instead, the statute expressly states that "when a vote <u>is conducted without a meeting</u>" the law (as of 2021) requires delivery of a ballot to every voter. See RCW 64.38.120(2); (6).

In both 2020 and 2021, Canterwood conducted its annual meeting virtually and not in person (due both years to the unprecedented challenges

[8] Mr. Brain states in his brief "in both 2020 and 2021, the vote was not conducted at the general meeting. Voting was by mail in ballot only." Appellant's Brief at 15.

brought on by Covid-19). The statute make no distinction regarding the method used in conducting the meeting or otherwise suggests that a meeting held virtually is not a meeting. Moreover, the Homeowner Association Act recognizes annual meetings may be conducted by "telephonic, video, or other conferencing process". *See* RCW 64.38.035(5). Additionally, RCW 64.38.120(3) expressly authorizes the person presiding over that meeting to designate the method of voting and use of a written ballot for voting is expressly authorized by RCW 64.38.120(3)(a). Nothing in that section requires Canterwood to provide a separate ballot to each owner of a lot. On the contrary, the statute clearly requires in subsection (b) agreement by the lot owners as to how its one vote will be cast when a lot has more than one owner.

To the extent the timing of the vote is relevant at all, voting was allowed during the meeting, just not virtual/electronic voting. That is, the paper ballot could be delivered to Canterwood while the meeting was occurring. However, the statute recognizes voting may occur outside the meeting. RCW 64.38.120 states in pertinent part as follows:

> (1) Owners may vote at a meeting in person, by absentee ballot pursuant to subsection (3)(d) of this section, or by a proxy pursuant to subsection (5) of this section.
>
> . . .
>
> (3) At a meeting of owners the following requirements apply:
>
> (a) Owners or their proxies who are present in person may vote by voice vote, show of hands, standing, written ballot, or any

> other method for determining the votes of owners, as designated by the person presiding at the meeting.

RCW 64.38.120 (emphasis added).

Nothing in the statute requires the votes only be collected at the meeting as Mr. Brain suggests. RCW 64.38.120(1) expressly recognizes that voting by absentee ballot is permissible and by definition absentee voting is not done at the meeting. The statute also recognizes that "any other method for determining the votes of owners" is acceptable. RCW 64.38.120(3)(a). In 2020 and 2021, the ballots could be delivered during the meeting, but also before and after the meeting (up to December 11 for the 2020 meeting and up to December 10 for the 2021 meeting).

In addition to the fact that the statute did not exist in 2020, Mr. Brain's contention that virtual meetings are not meetings has no merit and for that reason the requirements in RCW 64.38.120(6)(c) are inapplicable. Therefore, this Court should affirm the trial court's decision.

2. The definition of "ballot" in RCW 29A.04.008 does not apply to an HOA election.

For all the reasons stated in the previous section, it is unnecessary to even reach the issue of defining the word "ballot" because a meeting in fact took place both years at issue and the provision upon which Mr. Brain relies is inapplicable. Moreover, the definition of "ballot" in RCW 29A.04.008 should not be applied to a homeowner's association.

The legislation related to the election of state and local politicians

provided in chapter 29A.04 RCW is not the same subject as elections under the Homeowner Association Act governed by chapter 64.38 RCW. The term "ballot" is defined in RCW 29A.04.008(1) in pertinent part as:

> (c) A physical or electronic record of the choices of an individual voter in a particular primary, general election, or special election; or
>
> (d) The physical document on which the voter's choices are to be recorded . . .

While it is true that courts interpreting an undefined word in one statute can look to the definition of the same word in another statutory scheme, a court can only do so when the legislation relates to the same subject. *Champion v. Shoreline Sch. Dist. No. 412*, 81 Wn.2d 672, 676, 504 P.2d 304 (1972) (when the legislature uses a word in a statute with one meaning and subsequently uses the same word in legislating on the same subject, the word will be given the same meaning). The legislature was not legislating on HOA elections when it defined the term "ballot" in RCW 29A.04.008.

Voting in an HOA election is not remotely similar to voting in a state run election. Voting in a state run election is governed by an entire title of the Revised Code of Washington (Title 29A RCW), whereas voting in an HOA election makes up a few provisions of the Homeowners' Association Act (Ch. 64.38 RCW).

Voting in a state run election is constitutionally mandated to be by

ballot. *See* WASH. CONST. Art. 6, §6 ("All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.") Voting in an HOA election does not implicate the Washington Constitution in any way.

Pursuant to RCW 64.38.120, voting in an HOA election can be by a myriad of methods including "voice vote, show of hands, standing, . . . or any other method" none of which are recognized methods of voting under Title 29A. Similarly, fractional votes are not permitted in state run elections; whereas they can be permitted in HOA elections. Thus, it is clear that even if Canterwood did not conduct its annual meetings, the court cannot rely on the definition of ballot found in RCW 29A.04.008 because the legislature was not legislating anything remotely having to do with an HOA election.

D. Canterwood requests its attorney fees on appeal.

Canterwood requests its attorney fees on appeal pursuant to RAP 18.1 and RCW 64.38.050. RCW 64.38.050 provides that: "[a]ny violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party. Mr. Brain's case is premised on Canterwood's alleged violations of Ch. 64.38 RCW,

specifically RCW 64.38.120(6). Canterwood was undisputedly the prevailing party and should be awarded its attorney fees and costs on appeal.

V. CONCLUSION

For the reasons stated herein, this court should affirm the trial court's dismissal of Mr. Brain's Complaint with prejudice.

I certify this brief contains 5,585 words in compliance with the Rules of Appellate Procedure.

DATED this 3rd day of April 2023

GORDON REES SCULLY
MANSUKHANI, LLP

By: *s/ Kyle J. Rekofke*
Kyle J. Rekofke, WSBA # 49327
701 Fifth Avenue, Suite 2100
Seattle, WA 98104-7084
krekofke@grsm.com
Attorney for Canterwood Homeowners Association

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the foregoing document in Case No. 57716-0-II to the following parties indicated below:

Paul E. Brain, WSBA #13438
Brain Law Firm PLLC
950 Pacific Avenue, Suite 700
Tacoma, WA 98402-4450
Email: pbrain@paulbrainlaw.com

Mark R. Roberts, WSBA #18811
Roberts Johns & Hemphill, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335-1166
Email: mark@rjh-legal.com

Original e-filed with:
Washington Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 3, 2023 at Seattle, Washington

s/ Christine F. Zea
Christine F. Zea, Legal Assistant

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Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57716-0
Appellate Court Case Title:	Paul Brain, Appellant v. Canterwood Homeowners Association, Respondent
Superior Court Case Number:	22-2-06913-4

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Address:
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Seattle, WA, 98104
Phone: (206) 370-2365

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